IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-189

COUNCIL FOR EMPLOYMENT AND
ECONOMIC ENERGY USE,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

Petition for a Writ of Certiorari
to the First Circuit Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

The Petitioner, Council for Employment and Economic Energy Use, respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the First Circuit entered in May 4, 1978.

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 575 F.2d 511 and a copy of the opinion appears in the Appendix hereto. A copy of the opinion of the Federal Communications Commission also appears in the Appendix hereto.

JURISDICTION

The final judgment of the United States Court of Appeals for the First Circuit was entered in May 4, 1978. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether or not the Petitioner's right to equal protection under the laws was violated by a rule of the Federal Communications Commission (FCC), upheld by the Court of Appeals, allowing radio stations to give free advertising time to a political opponent of the Petitioner where said opponent was financially able to pay for that time.

2. Whether or not the holding of the FCC, upheld by the Court of Appeals, that certain radio stations had acted reasonably in meeting their "Fairness Doctrine" obligations was supported by substantial evidence.

3. Whether or not the application of the "Fairness Doctrine" in terms of the method which radio stations employed to comply with its requirements in the present case is consistent with the public interest.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment to the Constitution of the United States.
U.S. Const. Amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the poeple peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fifth Amendment to the Constitution of the United States
U.S. Const. Amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, whithout due process of law; nor shall private property be taken for public use, without just compensation.

3. Fourteenth Amendment to the Constitution of the United States
U.S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of

pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropraite legislation, the provisions of this Article.

4. 42 U.S.C. §2000e-2

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section or other area, or in the available work force in any community, State, section or other area.

5. 47 U.S.C. §303

Except as otherwise provided in the chapter, the Commission from time to time,

as public convenience, interest or necessity requires, shall -

(r) make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereinafter become a party.

6. 47 U.S.C. §307

(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.

(c) Omitted.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed

three years in the case of broadcasting licenses , and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action or applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals the Commission shall not require any such applicant to file any information which previously had been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subchapter, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes or stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class, if, in its judgment, public interest, convenience, or necessity would be served by such action.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license. June 19, 1934, c. 652, Title III, §307, 48 Stat. 1083; June 5, 1936, c. 511, §2, 49 Stat. 1475; July 16, 1952, c. 879, §5, 66 Stat. 714; Sept. 13, 1960, Pub.L. 86-752, §3, 74 Stat. 889; Apr. 27, 1962, Pub.L. 87-439, 76 Stat. 58.

7. 47 U.S.C. §309

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such applications and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Time of granting application

(b) Except as provided in subsection (c) of this section, no such application -

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

Applications not affected by subsection (b)

(c) Subsection (b) of this section shall not apply -

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for -

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized constructions or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a braodcast station,

(F) authorizations pursuant to section 325(b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

8. 47 U.S.C. §309

Hearings; Intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is present or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest

not more than tjirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of prodeeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

9. 47 U.S.C. §326

Nothing in this chapter shall be understood or construed to give the Commission power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. June 19, 1934, c. 652, Title III, §326, 48 Stat. 1019; June 25, 1948, c. 645, §21, 62 Stat. 862.

STATEMENT OF THE CASE

In the November, 1976 election, the citizens of Massachusetts were asked to vote on a ballot proposition which, had it been adopted, would have changed the utility rate structure in that state by creating a uniform or flat rate for all users of electricity. During the course of the election campaign, Petitioner, a political committee, organized under M.G.L. c. 55, to oppose the adoption of the proposition, began on October 4, 1976, to purchase spot advertisements on certain radio stations for the purpose of presenting its views and urging a "No" vote on that ballot proposition.

An organization known as Massachusetts Fair Share, Inc., (hereinafter MFSI) which was working for a "Yes" vote on the proposition, requested free time from these same radio stations for its own advertising, stating: "...we do not expect to be able to match the paid advertising of our opponents". MFSI did not state that it did not have the financial resources to purchase advertising. Indeed, it could not have so stated as it did have the financial resources to purchase advertising time.

Pursuant to MFSI's request, three licensees in Massachusetts determined to give MFSI free broadcast time to broadcast its opposing views on the proposition, the free time was given by all three licensees on a 2:1 basis, i.e., MFSI received one free announcement for every two announcements purchased by the Petitioner. The licensees in question neither made inquiry into the ability of MFSI to pay for the announcement nor, conducted an examination of its own broadcasting time to determine the number of hours of such time spent on the pros and cons of this ballot proposition.

Petitioner soon learned of the licensees' arrangement with MFSI and ceased their radio advertising campaign in the crucial week before the election. In the meantime MFSI purchased at least Thirty Thousand ($30,000) Dollars of television advertising time while they were receiving the free ads from the radio stations. There was also extensive discussion of the issue in newspapers and in a circular mailed to each registered voter by the Secretary of State.

On October 26, 1976, Petitioner petitioned the Federal Communications Commission (FCC) for a declaratory ruling with respect to application of the "Fairness Doctrine" in the above-described circumstances. Two days later, the FCC's Broadcast Bureau responded by ruling that the practices of the licensees were permissible. Petitioner applied for review by the full commission, which upheld the Broadcast Bureau. Federal Jurisdiction was invoked pursuant to 28 USC 2344.

REASONS FOR GRANTING THE WRIT

1. The Issues Raised in This Case Are of Widespread Importance and Raise Problems in the Application of the Fairness Doctrine in Light of This Court's Recent Opinion in First National Bank of Boston v. Bellotti

This case involves an instance where the purchaser of advertising time from radio stations has for the first time raised fundamental questions as to the application of the Fairness Doctrine. These questions relate to both the fundamental First Amendment rights of your Petitioner and of the public as a whole.

The narrow issue presented involves licensees giving free advertising time in the context of an election referendum campaign. The growing use and role of referendum ballot questions in the electoral process throughout the United States makes decision of the present issue compelling and the potential results far-reaching.

This Court has recently decided another controversy involving a different referendum question in the Massachusetts 1976 election. In First National Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978), this Court held that the Commonwealth of Massachusetts could not restrict the rights of corporations to participate in the discussion of referendum issues. The Court, quoting from Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) noted that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..."

In footnote 30 to the Bellotti decision the Court noted a limited exception to its holding in circumstances under which the doctrine of Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) is properly applied in upholding the constitutionality of the "Fairness Doctrine" on its fact, this Court stated in Red Lion:

> "We need not approve every aspect of the Fairness Doctrine to decide these cases...but will deal with those problems if and when they arise." (at 395)

This Court also recognized that "the applicability of its [the FCC's] regulations to situations beyond the scope of past cases

may be questionable". See Red Lion, supra, at 396.

Petitioner seeks this writ of certiorari to present for this Court's adjudication one of the problems that has arisen in application of the Fairness Doctrine which inhibited public debate on important referendum questions. It is Petitioner's position that where the actions of the Licenseer, FCC and the Court of Appeals have the effect of inhibiting rather than fostering public debate, this Court's decision in Bellotti, supra, is controlling.

2. Both the FCC and the Court of Appeals Have Recognized the Problem But Each Has Failed to Deal With It

The FCC states in its Report on the Fairness Doctrine, 48 FCC2d, 1, 33 (1974):

> "Finally, it is argued that some ballot issue advocates take advantage of the Cullman principle by spending their available money on non-broadcast media, then waiting for the other side to buy time on the air, and finally demanding that their own views on the proposition be given free broadcast exposure, thus obtaining a broadcast 'subsidy for their views...however, it is more important in a democracy that the public have an opportunity to receive contrasting views on controversial issues of public importance--that' robust, wideopen debate take place--than that the Cullman principle be abandoned because of the possible problems of a few parties."

However, the FCC has failed to recognize that the problem at hand does not stem from "the possible practices of a few parties". The problem is one that licensees and groups such as your Petitioners are having to deal with in growing numbers and is one that will continue to grow unless nipped in the bud. Further, the FCC policy has had the effect of inhibiting debate, rather than fostering it which is the rationale upon which applications of the Fairness Doctrine should be based.

The Court of Appeals likewise recognized the problem but also chose to ignore it, stating:

> "While, with respect to payment for time, there may be a point at which a calculated inequality of treatment by broadcasters among advertisers would raise a litigable issue, we see nothing arbitrary about the Commission's hands-off policy here."

Thus, the Court of Appeals, although recognizing that the issues in the case were not moot and that your Petitioner, as the purchaser of advertising time, was an aggrieved party, failed to deal with the compelling logic of Petitioner's argument.

What the Commission and the court have established is a situation whereby a licensee is not required to give opposing views free advertising time but to do so would not be found unreasonable under any circumstances. This policy and findings of the Commission and the court violates your Petitioner's Fifth Amendment rights, unconstitutionally chills the right of free speech and promotion of public debate,

and fails to promote responsibility on the part of licensees licensed to broadcast on the public air waves.

3. Implementation of the FCC's "Fairness Doctrine" Violated Your Petitioner's Right to Equal Protection Under the Law Pursuant to the Fifth Amendment to the United States Constitution

In the present action, the licensees took their actions in providing free advertising time to MFSI on a 2:1 basis because they felt that the Fairness Doctrine compelled it. This Court has held that when a state or one of its Administrative Agencies compels a private citizen or private corporation to do a particular act, then that act amounts to the action of the state. As this Court said "...a state is responsible for the discriminatory acts of a private party when a state, by its law, has compelled the act. When the state has commanded a particular result it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it." Adickes v. S.H. Kress and Co., 398 U.S. 168, 170 (1970).

Further, although this Court, in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 115 (1972) stated:

> "In dealing with the Broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority."

that case is distinguishable from the instant action on its facts. In the DNC case the alleged state action was the FCC's refusal to order radio stations to do a particular act, while in the present case the radio stations felt compelled by the FCC to act as they did.

In addition, the equal protection values appear in the "public interest" standard of the Communications Act, 47 U.S.C. 303. And this Court has made it clear that although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process". Schneider v. Rusk, 337 U.S. 163, 168 (1964); Bolling v. Sharp, 347 U.S. 497 (1954).

Where First Amendment rights of freedom of speech are involved, a classification with respect to speech will be sustained only upon a showing of a compelling state interest. First National Bank of Boston v. Bellotti, supra; Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucket, 364 U.S. 479 (1960). And the burden is on the Government to show the existence of such an interest. Elrod v. Burns, 427 U.S. 347 (1976). Even then, means must be employed which are "closely drawn to avoid unnecessary abridgement..." Buckley v. Valeo, supra, at p. 25.

In theory, the regulation operates to favor a class which, absent the regulation, might not have the same access to the radio medium as the advocate of a contrary position. As such, it has the seemingly laudable objective of stimulating a full and lively discussion of referenda issues. The regulation and the licensees' actions thereunder in the instant case attempts to accomplish this objective by establishing a quota of

free advertisements to which MFSI is entitled. The quota acts to equalize the disparate economic positions of the two opposing sides and thus impose a fairness and equality upon the debate which MFSI claims might otherwise be lacking were the two sides left to their own resources. It is this quota system, set up without regard to a party's ability to pay and without regard to alternative means, and not the concept of governmentally imposed "fairness" per se which Petitioner contends is abhorrent to the constitutional doctrine of equal protection under the laws.

Where, as in a referendum situation, an issue of considerable importance is presented for discussion to the public, Petitioner whole-heartedly endorses access to the broadcast medium by adherents of all positions regarding that issue. Petitioner contends efforts to insure that the public will be exposed to adequate argument and information necessary to intelligent decision making. What Petitioner contends is abhorrent to its constitutionally protected right of freedom of speech is the establishment of a rigid quota system as a mechanical substitution for editorial judgment. This system represents the abdication of the editorial judgment which the Fairness Doctrine is designed to foster. Benign discrimination is discrimination nonetheless.

As means must be employed which are "closely drawn to avoid unnecessary abridgement of freedom of speech", one might assume that the Commission and the Court of Appeals gave careful consideration to all possible alternatives (See subpart 6 infra, for examples of such alternatives) short of a methodology abridging freedom of speech and eliminated them only after a factually based conclusion that they were inadequate to achieve the goals of the Fairness Doctrine. But this

was not the case. The record is entirely devoid of any evidence as to the possible alternative non-discriminatory methodologies which the Commission and the Court of Appeals could be said to have considered and eliminated.

4. The Order of the Federal Communications Commission is Not Based Upon Substantial Evidence on the Record

Independent of the case law requirement noted in subpart 3, supra, is the requirement that any rule or order of the FCC must be supported by substantial evidence based upon the record taken as a whole. See e.g. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); United Television Company, Inc. v. FCC, 514 F.2d 279 (C.A.D.C. 1975). It is the Petitioner's contention that rather than being supported by any evidence, the Commission's order is based upon intellectualized sophistry.

The FCC's reasoning in its Memorandum Opinion and Order runs as follows: (1) the licensee has an obligation under the Fairness Doctrine to provide access to all sides of an issue of public interest; (2) that obligation may extend to presenting free advertising time to an advocate of a position contrary to the position of a more affluent advocate; (3) therefore, the licensee is being perfectly reasonable in donating free time to a position advocate on the basis of one free spot for every two spots paid for by an advocate of a contrary position.

In setting out the above logic the fact that the recipient of the free time was relatively less affluent than those who paid for their media time is purposely

omitted. This is because while the Commission had before it evidence that subsequent to the receipt of its free radio time Fair Share, Inc. had sufficient funds to purchase television time (Memorandum of Opinion and Order, Paragraphs two and three), these facts were dismissed out of hand. Apparently the Commission is of the opinion that whatever advocate shows up second is entitled to free time so long as his advocacy position is contrary to the first paying advocate. No other conclusion is feasible in light of the Commission's later statements, at paragraph 9 of the Memorandum.

> "The stations could have given, or possibly sold, time to other appropriate spokesmen to present a contrasting viewpoint on the ballot proposition..."

But

> "The critical issue is whether the sum total of the licensee's efforts...can be said to inform the public on the contrasting viewpoint - - one that is fair under the circumstances." Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 295 (1970).

Apparently then, the "Fairness Doctrine" as applied in the instant case, is concerned only with the fair coverage of the issue involved, and not fairness to the parties involved. And this despite the fact that it is entirely possible that fairness to both could be achieved. But the Federal Communications Commission made no attempt to achieve such true fairness. The record is devoid of any consideration

by the FCC of the relative ability to pay of the opposing advocates. Under the Commission's Order one can reasonably envision either, financially disparate advocates or financially equal advocates ludicrously jockeying to see who buys time first, if at all. Indeed, it is reasonable to conclude that future debates in the public interest will be eliminated altogether, as each advocate hestiates to buy media time out of reluctance to finance his opponent. Thus while logic may suffice as substantial evidence in the absence of real evidence, the Commission's Order in the instant case is far from being reasonably related to the ends of the Fairness Doctrine.

The Commission applied identical logic to other factors that might constitute substantial evidence supporting a conclusion that the methodology was reasonable, i.e., by failing to consider both what was then being done by the radio stations in terms of issue coverage and prospective alternatives to the quota system, the quota system took on the appearance of reasonableness. It is difficult to argue that when one knows no other path, the part which one is already upon would seem the best. But in light of the Commission's all consuming objective of fair coverage of the issue involved, factors critical to the accomplishment of its goals become extraneous impediments to its momentum. As the Commission put it in the Memorandum of Opinion and Order:

> "9. Thus, the Council is correct in its assertion that the stations were not required to give time to FSI. As a general rule, no particular person or group is entitled to appear on the stations' facilities, since

it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to express his views. The stations could have given, or possibly sold, time to other appropriate spokesmen to present a contrasting viewpoint on the ballot proposition, conceivably excluding FSI as a spokesman, and they could have, in the exercise of their discretion, used a variety of programming formats, including newscasts, news interviews, forums and debates to present contrasting viewpoints on this controversial issue of public importance. 'The critical issue is whether the sum total of the licensee's efforts...can be said to inform the public on the contrasting viewpoint -- one that is fair under the circumstances'." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d, 283, 295 (1970).

Perhaps "momentum" is the most accurate summary of the omissions' approach to devising a methodology for implementing the Fairness Doctrine in the instant case. The record shows clearly that no attempt was made to assess the effectiveness of methodologies either or both more effective in terms of objectives and less debilitating to constitutionally protected freedoms. Furthermore, the record reveals that no effort was made to determine whether so extreme a methodology as that chosen was even necessary in light of existing circumstances. No assessment of existing programs was made

including but not limited to newscasts, news interviews, forums and debates.

Surely the licensees involved in this case had different approaches to public interest issues in either degree or substance or both. If so, the imposition of an absolute quota system may have been in terms of the "Fairness Doctrine", remedial as to particular circumstances while abusive in others. It is even conceivable that with respect to a given situation, coverage may have been so extensive as to a view contrary to the Council's that the Council may have been entitled to free radio time. While no contention is being made to that effect, exaggeration demonstrates the inappropriateness of both the quota remedy and the procedures by which it was arrived at. Not only is there no evidence on the record to support such a blanket identity of coverage as the quota remedy assumes, but common experience belies that assumption. Indeed, it is doubtful any evidence could be produced to demonstrate that a blanket quota system resulted in fairness. In fact, no such evidence was produced.

It is instructive to note that the radio stations themselves devised the quota. As business organizations want to do, the quota was elected as the course of least resistance in complying with obligations under the Fairness Doctrine. Administratively it eliminated a necessity for each licensee to engage in thoughtful evaluations of their own program coverage of public interest issues and the relative media dissemination capacities upon those issues. One cannot find fault with the radio stations for seeking such a course of least resistance in a well-intentioned attempt to meet the public need. But much more is required of the Commission. It is

required to find substantial evidence on the record to support its Order. This it made no attempt to do.

5. The Court of Appeals Decision is Based On An Erroneous Legal Standard

Rather than scrutinize the record to determine if the FCC Order was supported by substantial evidence, the Court of Appeals apparently chose a standard of arbitrariness or bad faith. The court stated:

> "Significantly, the Council had not alleged that the radio stations deliberately chose to ignore the ability of Fair Share to pay or acted in bad faith." At p. 6 of the opinion.

Further on, the court states:

> "While, with respect to payment for time, there may be a point at which a calculated inequality of treatment by broadcasters among advertisers would raise a litigable issue, we see nothing arbitrary about the Commission's hands-off policy here. The Commission has done no more than rule that the donating of reply time is one acceptable means of meeting a licensee's obligations under the Communications Act, at least where is now showing that the licensee has deliberately and discriminatorily disregarded a respondent's ability to pay." At pp. 6 and 7.

Nowhere in its opinion, does the court cite a single case for the proposition that the standard of review here is arbitrariness or bad faith. Indeed, the court could not for as noted previously, the standard is one of substantial evidence on the record taken as a whole. See e.g. Universal Camera Corp. v. NLRB, supra; United Television Company, Inc. v. FCC, supra.

The Court of Appeals opinion, based on a standard of arbitrariness, bad faith and deliberateness, only serves to emphasize the lack of evidence in the record to support the Commission's Order.

6. Implementation of the Fairness Doctrine In the Instant Case Chilled the Right of the Public to Receive Access to Social and Political Ideas

This Court in Red Lion, supra, upheld the Fairness Doctrine on its face against constitutional challenge. As the FCC itself has pointed out, the constitutional challenge presented a difficult issue for "...at first appearance, this affirmative use of government power to expand the broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied absence of governmental supervision or control. Throughout most of our history the principal function of the first amendment has been to protect the free marketplace of ideas by precluding governmental intrusion. "Fairness Report, supra, at p. 3.

This Court resolved the paradox first by examining the unique features of the electronic broadcast industry and the unique position which the broadcast licensee main-

tains therein. See Red Lion, supra, at pp. 386-392. Also Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); National Broadcasting Co. v. U.S., 319 U.S. 190, 226 (1943).

And this Court in Red Lion enunciated a First Amendment standard with respect to the electronic broadcast industry which placed paramount the right of the public to be informed:

> "...the people as a whole retain their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the government itself or a private licensee. [S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Red Lion, supra, at p. 390.

Thus, the "Fairness Doctrine" is upheld against this First Amendment challenge because rather than having an inhibitory effect, it is supposed to "foster the uninhibited marketplace of ideas". In so doing, the Court apparently recognized that the free speech values of the First Amendment are incorporated in the "public interest" standard of 47 U.S.C. 303.

And as this Court further elaborated in

the Columbia Broadcasting case, supra, at 390, "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

It is precisely the right of the public to receive differing points of view which is being interfered with in the present case. The Petitioner found it necessary to cease its radio campaign because the radio stations, from which Petitioner purchased broadcast time were giving one free spot advertisement to Massachusetts Fair Share, Inc. (MFSI) for every 2 or 3 spots purchased by Petitioners. As a result of this policy neither the political advertisements of Petitioner nor those of MFSI were broadcast on any of the major Boston area radio stations in the crucial week before the 1976 general election.

In denying Petitioner's application for review, the FCC, and the Court of Appeals, were forced into the doctrinal straightjacket of approving, as consistent with the "Fairness Doctrine" (and presumable with the free speech values of the First Amendment) conduct by the radio stations which effectively ended debate on a referendum question by the most competent spokesmen for each side. And this was done on a barren record, devoid of any substantial evidence upon which to support the reasonableness of the radio station's actions.

The otherwise paradoxical outcome in this case, i.e., the application of the Fairness Doctrine resulting in a stifling of debate, suggests the need for a further refining of the relationship between the

FCC and the broadcast industry which is regulated.[1] "...The difficulty and delicacy of administering the Communications Act [is] a function calling for flexibility and the capacity to adjust and re-adjust the regulatory mechanism to meet changing problems and needs". Columbia Broadcasting Systems v. Democratic National Committee, supra, at 118.

Such a modification in the "Fairness Doctrine" must take care on the one hand that it not encroach upon that range of decision which Congress has left to the journalistic discretion of the licensee and on the other hand that it not so chill debate that the public is deprived of the full and robust debate to which it is entitled. In fashioning the modification three facts in the present case are salient. (1) Petitioner's radio advertising campaign was chilled by the mechanical application of the Fairness Doctrine; (2) the response of each radio station in question in fulfilling their "Fairness Doctrine"obligations was virtually identical. Each provided Massachusetts Fair Share, Inc. with a quota of free spot ads proportional to the number of spot advertisements purchased by the Petitioner. The record is devoid of evidence showing what journalistic considerations each took into account in reaching their

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[1] Indeed the public interest standard of 47 U.S.C. 303 would seem to require such a change for the FCC has interpreted that standard to call for the stimulation of debate. The First Amendment also requires this refinement in the Fairness Doctrine because in the present case "state action" has chilled free speech.

decisions. Indeed it appears that they felt they were required to by the Fairness Doctrine. For all that appears in the record the stations have mechanically opted in this fashion because it was the easiest and cheapest of any complying with the Fairness Doctrine. (3) Massachusetts Fair Share, Inc. was capable of paying for the radio spot advertisements which it received at no cost.

The following modification in the Fairness Doctrine will serve to continue to foster the aims of the doctrine without chilling the speech of the Petitioner in a case such as the present case. When a group purchases radio advertising time to advocate one side of a question of public interest, the licensee must evaluate the availability of alternative means of meeting its fairness doctrine obligations. It must determine the availability and practicability of (1) discussion programs involving participants with differing views; (2) offering the editorial mailbag; (3) feature presentations regarding the issue and (4) paid spot ads of the opposing view to purchase time. If the licensee finds that such alternatives are impractical then it may grant a quota of free radio spot time to qualified opponents in fulfillment of its fairness obligation. This is consistent with the compelling interest standard which was discussed above, for the only time the quota and concomitant reverse discrimination would be employed was when there was no other way of giving a fair presentation to both sides.[2]

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[2] This approach is also consistent with that endorsed and approved by the National Association of Broadcasters in their 1976 publication, Political Broadcast Catechism. See questions and answers 165-167. hereto.

This is also consistent with the FCC's approach to the manner in which it suggests licensees should meet their fairness obligation. The FCC has indicated its disapproval of employment of rigid quotas.

> "[W]e do not believe that it would be appropriate for this Commission to establish any... mathematical ratio, such as 3 to 1 or 4 to 1, to be applied to all cases. We believe that such an approach is much too mechanical in nature and that in many cases our pre-conceived ratios would prove to be far from reasonable...Moreover, were we to adopt a ratio for fairness programming, the 'floor' thereby established might well become the 'ceiling' for the treatment of issues by many stations, and such a ratio might also lead to a preoccupation with a mathematical formula to the detriment of the substance of the debate." Report on Fairness Doctrine, 48 FCC 2d 1, 17 (1974). See also Public Media Center, 59 FCC 2d 494, 517 (1976).

Both the FCC and the Court of Appeals have recognized the abuses inherent in the present situation but each has failed to "adjust and re-adjust the regulatory mechanisms to meet [these] changing problems and needs." Having failed to do so, it is incumbent upon this Court to grant a writ of certiorari to the Court of Appeals for the First Circuit in order to examine the abuses in the present situation and remedy them accordingly.

CONCLUSION

For these reasons a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

/s/ Albert P. Zabin
1 Center Plaza
Boston, MA 02108

/s/ Sanford A. Kowal
294 Washington Street
Boston, MA 02108

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
October 28, 1976

73942
In Reply Refer to:
8330-M
C10-1377

Michael Finkelstein, Esq.
Boasbert, Hewes, Finkelstein & Klores
2101 L Street, N.W.
Washington, D.C. 20037

Dear Mr. Finkelstein:

This is in reference to your letter dated October 26, 1976 on behalf of the Council for Employment and Economic Energy Use (The Council) wherein you requested information concerning the applicability of the so-called "Cullman Rule" 1/ as to the responsibility of radio stations WJIB and WROR, Boston, Massachusetts, and WNCR, Worcester, Massachusetts with regard to the forthcoming Massachusetts ballot proposition. You state that the Council has purchased broadcast time on the above-noted stations for the broadcast of certain radio announcements; that the stations, in order to comply with their obligations under the fairness doctrine, have given free time to an organization called Fair Share, Inc., (FSI), on a 2:1 ratio 2/to present a contrasting viewpoint on the ballot proposition in question; that the Council believes that FSI has the financial means of purchasing time on the radio stations and that FSI has allegedly purchased a considerable amount of braodcast time from WROR, WJIB and WNCR. You request that the Commission find that it is "unreasonable" for the radio stations "to offer free time to FSI solely because the Council purchased time on the stations" and that the radio licensees airing the Council's announcements "are not required to offer free time to FSI".

As a general proposition, the fairness doctrine requires that a Commission licensee having presented one side of a controversial issue of public importance afford reasonable opportunity for the presentation of contrasting viewpoints. This policy does not require that "equal" time be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Rather, the Commission places on the braodcaster an affirmative responsibility and an ongoing duty to encourage and implement the broadcast of contrasting views in its overall programming.

Ballot propositions are treated by the Commission as all other controversial issues of public importance. With respect to these propositions, "as in all fairness matters, the licensee is required to use his own discretion regarding issues to be presented, the amount of time to be devoted to each, parties to present contrasting views and the formats to be employed." Fairness Report, 48 FCC2d 1, 33 (1974). It is, therefore, the responsibility of the licensees within their good faith discretion to determine how to present contrasting views on the issue in question. They may choose to provide free spot or program time or choose any other format in any reasonable manner to discharge their fairnes doctrine obligations in their overall programming. The Commission will review the licensees' actions only to determine whether the licensees have acted reasonably and in good faith. Id. at 33

In view of the above, and as you have not shown that the licensees abused their discretion by offering free time to FSI to discharge their fairness doctrine obligations, we cannot conclude that under the circumstances the licensees have acted unreasonbly.

Similarly, we cannot find the stations' offer of free time to FSI to be unreasonable

"solely" because time was sold to the Council. Where Commission licensees have chosen to broadcast sponsored programming which presents one side of a controversial issue of public importance, they cannot reject exposition of contrasting viewpoints on that issue merely because they cannot obtain paid sponsorship for that presentations. Cullman Broadcasting Co., Inc. 40 FCC 576 (1963). Moreover, although you state that FSI has evidenced its ability to pay for the presentation of their views by subsequently purchasing television broadcast time, we have specifically rejected your argument that it is unfair to obtain paid media exposure and then to seek free broadcast time under Cullman simply because of lack of funds. See Fairness Report, supra, 48 FCC 2d at 31-33. As we noted there, and reiterate here, the public interest dictates that it is more important that "robust wide-open debate" be fostered "than the Cullman principle be abandoned because of the possible practices of a few parties." Id at 33.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

William B. Ray, Chief
Complaints and Compliance
Division for Chief, Broadcast Bureau

cc: WROR
WJIB
WNCR
Counsels

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 77-406
69251

In Re Complaint of	)
	)
Council For Employment and Economic Energy Use	)
	)
against	)
	)
Radio Stations WJIB(FM) & WROR (FM) Boston, Massachusetts	)
	)
and Radio Station WNCR Worcester, Massachusetts	)

MEMORANDUM, OPINION AND ORDER

Adopted: June 9, 1977;
Released: June 27, 1977

By the Commission: Commissioner White issuing additional views.

1. The Commission has before it an Application for Review filed on December 16, 1976 by the Council for Employment and Economic Energy Use (Council) of the Broadcast Bureau's ruling of October 28, 1976 concerning its fairness doctrine complaint against radio stations WJIB (FM) and WROR (FM), Boston, Massachusetts and WNCR, Worcester, Massachusetts. 1/

1/ Also before the Commission are the following related pleadings: (a) "Statement in Support", filed December 30, 1976, by Metromedia, Inc.; (b) "Response to Application for Review", filed January 3, 1977 by

2. The initial complaint in this case, filed October 26, 1976, stated that the Council had purchased broadcast time on the aforementioned stations to present its views with regard to a forthcoming Massachusetts ballot proposition regarding that state's electric rates; that the stations, in order to discharge the obligations that they felt they had incurred under the fairness doctrine by broadcasting the Council's spot announcements, gave free broadcast time to an organization called Fair Share, Inc. (FSI) to present contrasting viewpoints; and that FSI allegedly had sufficient funds available to purchase time on a local television station after free time for radio spot announcements had been obtained on stations WJIB(FM), WNRC and WROR(FM). The complainant urged the Commission to find that it was "unreasonable" for the licensees to "offer free time to FSI solely because the Council purchased time on the stations", and that the radio stations broadcasting the

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1/ (cont.) General Electric Broadcasting Company, Inc., licensee of Station WJIB (FM), Boston, Massachusetts; (c) "Statement in Support", filed January 10, 1977, by the National Association of Broadcasters; (d) comments, filed January 10, 1977 by Plough Broadcasting Company, Inc.; (e) opposition, filed February 4, 1977 by Maine Citizens for Returnable Containers; and (f) reply, filed February 11, 1977, by the Council for Employment and Economic Energy Use. We do not believe it necessary to summarize and comment on each and every point raised in the aforementioned pleadings. We have fully considered the arguments advanced in all of these pleadings in reaching our determination. The Commission also received comments, filed April 12, 1977, by KTVB, Inc., and an opposition, filed April 19, 1977 by Maine Citizens for Returnable Containers.

Council's spot announcements were "not required to offer free time to FSI." The Commission's Broadcast Bureau, citing Cullman Broadcasting Company, 40 FCC 576 (1963), ruled that the licensees acted reasonably in determining to meet their fairness doctrine obligations by affording free spot announcement time to FSI, subsequent to selling time to the Council.

3. In its Application for Review, filed December 16, 1976, the Council states that the Broadcast Bureau erred in that it did not determine "whether the stations" were required to provide the free time". In this regard, the Council states that the question presented for review is "whether the stations are required under the "Cullman Rule" to provide a fixed ratio of spot announcements to an organization seeking to express views in a ballot proposition different from views expressed in paid spot announcements braodcast on the stations, when the organization is fully able to pay for the time it requests". Apparently, the Council's position is that the fairness doctrine does not mandate that free time be made available to FSI under the circumstances of this case because, allegedly, the FSI by its own actions in subsequently purchasing broadcast time on a television station demonstrated that it was "financially able to purchase time for the presentation of its views."

4. It appears that the Council is requesting the Commission to hold that the stations, by donating time to FSI, did more than was necessary to discharge the fairness doctrine obligations they felt had been incurred by braodcasting the Council's paid spot announcements. As indicated more fully herein, the question, in effect, is not whether the licensees were required to give time to FSI to broadcast a contrasting view

on the electric rate ballot proposition, but whether the stations acted reasonably in determining to discharge their fairness doctrine obligations in this particular manner.

5. The fairness doctrine imposes a duty on the Commission's radio and television licensees to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. §315(a). See generally, Green v. FCC, 447 F.2d 323, (D.C. Cir. (1971)); Fairness Report, 48 FCC 2d 1.

6. The Commission treats ballot proposition issues as it does all other controversial issues of public importance: "[T]he licensee is required to use his own discretion regarding issues to be presented, the amount of time to be devoted to each, parties to present contrasting views, and the formats to be employed." Fairness Report, supra, 48 FCC 2d at 33. The licensees' actions will be reviewed by the Commission only for reasonableness and good faith. See also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 (1964).

7. Where stations have sold time for the presentations of one side of a controversial issue of public importance they must make the initial determination whether they have complied with the fairness doctrine by affording reasonable opportunity for the presentation of contrasting viewpoints in their overall programming on the issue in question. If, as it appears herein, 2/ the licensees are of the view that substantially more exposure of one particular viewpoint has been presented they make some additional effort to present contrasting viewpoints.

8. The stations have a right to encourage the broadcast of contrasting viewpoints on a sponsored basis; they may not, however, insist upon payment on all occasions, Red Lion Broadcasting Co., 1 FCC 2d, 541 (1965). If exposition of the viewpoint cannot be presented through the means of paid broadcast, the licensees cannot reject its presentation on the grounds that they cannot obtain paid sponsorship, Cullman Broadcasting Co., 40 FCC 576 (1963). This does not mean that WFIB(FM), WNCN or WROR(FM) were necessarily required to donate time to any particular individual or group - or to refrain from giving time to such persons. The choice of the appropriate spokesman and the means or combination of means to achieve fairness lies within the licensee' good faith discretion.

9. Thus, the Council is correct in its assertion that the stations were not required to give time to FSI. As a general rule, no particular person or group is entitled to appear on the stations' facilities since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to express his views.

2/ In its "Response" filed January 3, 1977, General Electric Broadcasting Co., Inc., the licensee of WJIB(FM), acknowledges that giving FSI free spot announcements on a 2:1 ratio basis was determined to have been found by it to be one "reasonable way to meet its fairness doctrine obligations" raised by the "substantial schedule of spots purchased by the Council."

The stations could have given, or possibly sold, time to other appropriate spokesmen to present a contrasting viewpoint on the ballot proposition, conceivably excluding FSI as a spokesman, and they could have, in the exercise of their discretion, used a variety of programming formats, including newscasts, news interviews, forums and debates to present contrasting viewpoints on this controversial issue of public importance. "The critical issue is whether the sum total of the licensee's efforts...can be said to inform the public on the contrasting viewpoint -- one that is fair under the circumstances." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 295 (1970).

10. Considering the totality of circumstances, we cannot conclude that the licensees acted unreasonably or in bad faith in determining to fulfill their fairness doctrine obligations by giving time to FSI. While it appears thay the Council would have us hold that the licensees' donation of free time to FSI without prior examination of FSI's financial situation was unreasonable, or an abuse of discretion, no Commission rule or regulation required any such examination by a Commission licensee. Finally, as noted by the Broadcast Bureau,. we have expressly rejected the contention that it is patently unfair or unreasonable for a group to obtain paid print or broadcast media exposure and also seek free broadcast time under Cullman. We reaffirm this position. 4/

4/ As stated in the Fairness Report, 48 FCC 2d at 32-33:

[I]t is argued that some ballot issue advocates take advantage of the Cullman principle by spending their available money

11. In light of the foregoing further Commission action on the Council's complaint is not warranted, and the Application for Review IS DENIED.

Federal Communications Commission,

Vincent J. Mullins
Secretary

4/ (cont.) on non-broadcast media, then waiting for the other side to buy time on the air, and finally demanding that their own views on the proposition be given free broadcast exposure, thus obtaining a broadcast "subsidy" for their views. To the extent that this could occur, the same criticism can be voiced against any application of Cullman. We believe, however, it is more important in a democracy that the public have an opportunity to receive contrasting views on controversial issues of public importance - that "robust, wide-open debate" take place - than that the Cullman principle be abandoned because of the psosible practices of a few parties. Moreover, the fairness doctrine does not require equality of exposure of contrasting views, and those who rely solely on Cullman have no assurance of obtaining equality by such means.

ADDITIONAL VIEWS OF COMMISSIONER WHITE

What petitioners seek here is a declaratory ruling, based on a set of existing facts, that a licensee is not required to apply the Cullman doctrine where the organization seeking free broadcast time is capable of purchasing that time. The Council fears that FSI's request for free time was calculated as (and seems to suggest that the Council was the victim of) a mechanism for allocating the expenditure of media funds. It suggests that the Cullman principle is susceptible of abuse by parties using the principal to pressure braodcasters to give away what might be sold.

I believe that the majority opinion treats these concerns too glibly. The question of abuse of the Cullman principle is a serious one at which a hard look is required. It is my belief that where abuse is shown, the Commission must carefully reexamine our application of the principle.

When the Commission discussed the question of potential abuse in the Fairness Report, 48 FCC 2d 1, 32-33(1974), it chose to risk some abuses in order to further the policy that "robust, wide-open debate" take place. The recent filing by KTVB in this proceeding indicates both that abuses exist and that the resulting reaction by licensees may be to reduce "robust, wide-open debate" in order to achieve "fairness".

In KVTB's case, a group lobbying for a state "right-to-work" law purchased spot time to air its views. The AFL-CIO, not generally known as an impoverished organization, demanded free spot time to counter those views. Two stations, apparently believing that the Cullman principle required them to accede to the AFL-CIO's demands, agreed to provide free spot time. KTVB refused, saying that it would be unfair to give the AFL-CIO something free which the Freedom to Work Committee had paid for, and that it had provided sufficiently balanced coverage on the issue. KTVB later refunded the Committee's money and provided free time to the AFL-CIO. The station also announced that it would no longer accept paid commercials on subjects of public controversy. The net effect is that in order to protect itself the station must close off one avenue for "robust, wide-open debate". Thus, the rationale for accepting abuses of the Cullman principle evaporates.

The Commission should make clear to every licensee that the purpose of Cullman is to protect against the complete dominance in debate of those views which are well funded.. While, as in the present case, a station may meet its Fairness Doctrine responsibilities by providing free spot time, licensees should be informed clearly that Cullman does not make this a requirement.

United States Court of Appeals
For the First Circuit

No. 77-1371

COUNCIL FOR EMPLOYMENT
AND ECONOMIC ENERGY USE,
PETITIONER,
v.
FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
RESPONDENTS.

PETITION FOR REVIEW OF ORDER OF
FEDERAL COMMUNICATIONS COMMISSION

Before
COFFIN, *Chief Judge,*
CAMPBELL AND BOWNES, *Circuit Judges.*

Sanford A. Kowal with whom *Sallop, Kowal & Davis, Associates* was on brief for appellant.

Diana L. Evans, counsel with whom *Robert R. Bruce*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *C. Grey Pash, Jr.*, counsel, Federal Communications Commission were on brief for respondents.

Thomas H. Wall, B. White Perry, D. Todd Christofferson, and *Dow, Lohnes & Albertson* on brief for intervenor, Plough Broadcasting Company, Inc.

May 4, 1978

CAMPBELL, *Circuit Judge.* We are asked to disapprove a Federal Communications Commission ruling made under its "fairness doctrine". On October 26, 1976, one week before the general election in November, the Council for Employment and Economic Energy Use (the "Council") petitioned the Commission for a declaratory ruling with respect to application of the "fairness doctrine" to radio advertisements concerning a referendum question on the Massachusetts ballot. Two days later, the Commission's Broadcast Bureau responded by ruling that the practices about which the Council complained were permissible. After the election, the Council applied for review by the full Commission, which upheld the Broadcast Bureau. The Council then sought review in this court. Before argument the Commission filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the Council is not a "party aggrieved" by a Commission order within the meaning of 28 U.S.C. § 2344.

The Council is a political organization formed under Mass. Gen. Laws ch. 55, § 6. It had opposed a proposed law which, if approved in the November 1976, referendum, would have prohibited utilities from selling electricity at discount to large consumers. Commencing October 4, 1976, the Council advertised its views by means of paid radio advertising. Fair Share, Inc., an organization with views opposing those of the Council, thereafter demanded and received from three Massachusetts stations free time to respond to the Council's advertisements. The Council's petition alleged that Fair Share received one free minute of radio time from these stations for every two purchased by the Council. The Council claimed that Fair Share had had adequate resources to pay for the radio time and in fact purchased $30,000 of television time after it had received the free radio time. The petition requested the FCC to rule

> "that it is unreasonable for stations to offer free time to [Fair Share] solely because the Council purchased time on the stations and that stations carrying the Council's announcements are not required to offer free time to FSI."

The Broadcast Bureau upheld the reasonableness of the particular stations' actions on the ground of the wide range of discretion accorded broadcasters in meeting their fairness doctrine responsibilities. The Bureau observed,

> "It is . . . the responsibility of the licensees within their good faith discretion to determine how to present contrasting views on the issue in question. They may choose to provide free spot or program time or choose any other format in any reasonable manner to discharge their fairness doctrine obligations in their overall programming. The Commission will review the licensees' actions only to determine whether the licensees have acted reasonably and in good faith."

Although the voters decided the referendum in accordance with the Council's wishes, the Council pressed an appeal to the Commission. The Council contended that the Bureau had failed to address the question of whether the fairness doctrine compelled the action taken by the three radio stations.

> "The question presented for review is whether radio stations are *required* under the 'Cullman rule'* to provide a fixed ratio of free spot announcements to an organization seeking to express views on a ballot proposition different from views expressed in paid spot announcements broadcast on the stations when the organization is fully able to pay for the time it requests.

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*"Cullman Broadcasting Company, Inc., 40 FCC 576 (1963)."

The application did not directly challenge the determination that the radio stations had acted reasonably, and in its reply to comments on the application made by other parties, the Council declared,

> "[The central issue of this case] is not, as the Bureau suggests, whether 'the licensees abused their discretion in offering free time to [Fair Share],' but, rather, whether the Commission should have imposed any Fairness Doctrine obligations on the stations under the particular facts of this case. It is the Commission's requirement and not the licensees' response to that requirement that is at issue here." [Footnote omitted.]

In spite of the way the Council cast the question for review, the Commission chose to delve into the appropriateness of the response by the three radio stations to their perceived obligations. As the Commission put it,

> "It appears that the Council is requesting the Commission to hold that the stations, by donating time to [Fair Share], did more than was necessary to discharge the fairness doctrine obligations they felt had been incurred by broadcasting the Council's paid spot announcements. As indicated more fully herein, the question, in effect, is not whether the licensees were required to give time to [Fair Share] to broadcast a contrasting view on the electric rate ballot proposition, but whether the stations acted reasonably in determining to discharge their fairness obligations in this particular manner."

The Commission ruled that "the Council is correct in its assertion that the stations were not required to give time" to Fair Share. The stations' fairness doctrine obligations could have been met in a number of ways, including paid advertisements, increased news coverage, or debate broadcasts. But considering the totality of the circumstances, the Commission declined to rule that the action taken by the three radio stations was unreasonable or in bad faith. It noted its past refusal to insist upon substantiation of a plea of poverty before an interest group

obtained free time pursuant to the fairness doctrine, *see Fairness Report,* 48 F.C.C. 2d 1, 31-32 (1974), and instead relied on the sound discretion and financial self-interest of broadcasters to assure that groups that could pay for air time would be charged.

The Commission argues that we lack jurisdiction to entertain this appeal because the dispute between the Council and the radio stations is moot and therefore no longer constitutes a justiciable case or controversy. Supporting this contention are the facts that the referendum over which this conflict arose is over, that the Council's position prevailed, and that the Commission could not now meaningfully order increased broadcasting directed to either side of the issue. The Council responds by pointing out that the question addressed in the 1976 election — whether electric utilities may be allowed to sell power at a discount to large consumers — remains a live issue in Massachusetts. Further efforts are underway to prohibit these discounts, which the Council will oppose. It is therefore possible that the issue presented in this proceeding will arise once more, leaving the Commission's present declaratory ruling as dispositive unless reversed by this court. The Commission replies that the Council failed to disclose any ongoing political interest past the 1976 election, but under Massachusetts law a political organization such as the Council does not come to an end automatically upon the passing of the particular election for which it was organized. *See* Mass. Gen. Laws ch. 55, § 6. The very fact that the Council continues to seek a decision after the election is some indication that its concern is real and continuing. We do not think the case is moot. *See, e.g., First National Bk. of Boston* v. *Bellotti,* 46 U.S.L.W. 4371, 4374 (U.S. Apr. 26, 1978); *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974).

The FCC contends that the Council was not aggrieved by the Commission's decision, and thereby lacks standing under 28 U.S.C. § 2344. The Commission argues that in deciding whether radio stations were required to give free time to the Council's opponents, it resolved in the Council's favor a question described by the Council as the only issue on review. But the Commission also ruled that the manner in which the three radio stations satisfied their fairness obligations in the 1976 campaign was reasonable, a conclusion which the Council has disputed throughout these proceedings. We think the Council is aggrieved.

The narrow issue before us is whether the Commission could properly allow a radio station to allot free time to a political organization to rebut advertisements paid for by another, where subsequent events indicate that the rebutting organization might have been able to pay for the time received. Significantly, the Council has not alleged that the radio stations deliberately chose to ignore the ability of Fair Share to pay or acted in bad faith. Rather the thrust of its contention seems to be that the radio stations acted unreasonably even if they believed in good faith that Fair Share could not, or perhaps for some good reason, would not, pay. So stated, the Council's position is unsupportable. The fairness doctrine has been upheld as constitutional by the Supreme Court, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). The Court has said "that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials." *Id.* at 396. The focus of the fairness doctrine is upon the public dissemination of both sides of an issue rather than protection of particular advertisers. While with respect to payment for time, there may be a point at which a calculated inequality of treatment by broadcasters among advertisers would raise a

litigable issue, we see nothing arbitrary about the Commission's hands-off policy here. The Commission has done no more than rule that the donating of reply time is one acceptable means of meeting a licensee's obligations under the Communications Act, at least where there is no showing that the licensee has deliberately and discriminatorily disregarded a respondent's ability to pay.* The Commission may well believe that for it to try to instruct broadcasters when to offer free time and when not would deprive them of flexibility needed to apply the fairness doctrine in the varied situations that arise. Broadcasters may normally be expected to charge for time when feasible, but circumstances may arise where the public interest is better served by an allotment of free time. In any event, we see nothing unreasonable, unconstitutional or otherwise illegal in the Commission's policies in this regard.

The Council argues that a fixed ratio of reply time to paid political advertising time constitutes an unconstitutional quota in derogation of its first amendment and equal protection rights and cites a variety of race discrimination cases to support its claim. The argument is patently absurd: these ratios, even if they were as rigidly imposed as the Council represents, in no way restricted the amount of time available to the Council. The Council's only complaint is that its opponents also had an opportunity to communicate their views. It would be a novel interpretation of the first amendment to find within its strictures a right not to be controverted in public political debate.

Petition dismissed. Costs for Commission.

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* This is not to suggest that broadcasters are under any duty to investigate the financial status of those groups seeking free air time or that they should require financial disclosure from such groups. The Commission does not require such conduct and we find it proper and reasonable that it does not.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

CERTIFICATE OF SERVICE

I, Sanford A. Kowal, co-counsel for the Council for Employment and Economic Energy Use, Petitioner herein, do hereby certify that I have this 2nd day of August, 1978 served three copies of the within and foregoing Petition for a Writ of Certiorari to the First Circuit Court of Appeals by mailing copies first class postage prepaid to: Diana L. Evans, Attorney, Federal Communications Commission, 1919 M Street, N.W., Room 610, Washington, D.C. 20554; Thomas H. Wall, Esq., Low, Lohnes, Albertson, 1225 Connecticut Ave., N.W., Suite 500, Washington, D.C. 20036; Randy I. Bellows, Esq., Media Access Project 1609 Connecticut Ave., Washington D.C. 20009 and Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for respondents herein.

Sanford A. Kowal
Attorney at Law

COMMONWEALTH OF MASSACHUSETTS
Suffolk, SS August 2, 1978

Then personally appeared before me the above-named Sanford A. Kowal and made oath that the foregoing was true.

Notary Public

My commission expires: July 4, 1982

No. 78-189

In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C)[1] is reported at 575 F.2d 311. The opinion of the Fed-

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[1] Petitioner has not labelled or paginated its appendices. For convenience, the October 28, 1976 letter from the FCC (Pet. App. 1-3) will be cited as "Pet. App. A," the FCC's decision (Pet. App. 4-12) as "Pet. App. B" and the court of appeals' opinion (Pet. App. 13-19) as "Pet. App. C."

eral Communications Commission (Pet. App. B) is reported at 65 F.C.C. 2d 26.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. The petition for a writ of certiorari was filed on August 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was reasonable for the Federal Communications Commission to find that radio stations that provided free broadcast time to petitioner's political opponents did not abuse their discretion under the fairness doctrine.

STATEMENT OF THE CASE

Petitioner is a political committee organized to defeat a 1976 Massachusetts referendum.[2] As part of its campaign, petitioner purchased time on several radio stations to present its views opposing the referendum. These radio stations also provided time, without charge, to Fair Share, Inc. (FSI), an organization that supported the referendum. According to petitioner, the stations provided one free minute to Fair Share for each two minutes that petitioner purchased (Pet. App. C2).

[2] The referendum (which was defeated) would have required uniform electricity rates and thus limited the discount for volume purchases of electricity.

In October 1976, petitioner sought a declaratory ruling from the Commission that the stations' provision of free time for the presentation of opposing views was unreasonable and that the stations were not required to make free time available (J.A. 1-3).[3]

Emphasizing licensees' broad discretion in discharging their fairness doctrine obligations, the Commission's staff denied petitioner's request for a declaratory ruling and concluded that there was no basis for finding that the stations had abused their discretion in this instance (Pet. App. A1). Petitioner then asked the Commission to modify its staff's ruling in order "to make clear that broadcast stations are not required to provide free air time at a fixed ratio to financially-able advocates * * *" (J.A. 15).

The Commission agreed with petitioner that stations were not required to give free time to those who desired to present an opposing view:

> As a general rule, no particular person or group is entitled to appear on the stations' facilities since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any indvidual to express his [own] views.

(Pet. App. B5). It reiterated its view, however, that "[t]he choice of the appropriate spokesman and the means or combination of means to achieve fairness lies within the licensees' good faith discretion" (*ibid.*).

[3] References to "J.A." are to the Joint Appendix filed in the court of appeals.

Recognizing that the method the broadcasters in this case chose to meet their fairness doctrine obligations was not the only way they could have handled the matter, the Commission noted:

> The stations could have given, or possibly sold, time to other appropriate spokesmen to present a contrasting viewpoint on the ballot proposition, conceivably excluding FSI as a spokesman, and they could have, in the exercise of their discretion, used a variety of programming formats, including newscasts, news interviews, forums and debates to present contrasting viewpoints on this controversial issue of public importance.

(Pet. App. B6). Nevertheless, after considering the "totality of [the] circumstances," the Commission was unable to find that these licensees had acted unreasonably by affording petitioner's opponents free broadcast time to make their views known to Massachusetts voters (*ibid.*).

The court of appeals affirmed, noting that "[t]he Commission has done no more than rule that the donating of reply time is one acceptable means of meeting a licensee's obligations under the Communications Act * * *" (Pet. App. C7). The court held that there was "nothing unreasonable, unconstitutional or otherwise illegal" in the Commission's "hands-off" policy with respect to the manner in which a licensee chooses to fulfill its fairness doctrine obligations (*ibid.*). The court rejected as "patently absurd" petitioner's argument that the stations' provision of free time to petitioner's opponents constituted an unconstitutional quota that violated petitioner's First Amendment and equal protection rights. The court concluded:

> The Council's only complaint is that its opponents also had an opportunity to communicate their views. It would be a novel interpretation of the first amendment to find within its strictures a right not to be controverted in public political debate.

(Pet. App. C7).[4]

ARGUMENT

The decision of the court of appeals is correct, fully consistent with decisions of this Court and other courts of appeals and presents no issue warranting further review.

1. Petitioner's assertion (Pet. 17-20) that the Commission's ruling applying the fairness doctrine[5]

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[4] The court of appeals also concluded that petitioner had standing and that the controversy had not become moot.

[5] Under the FCC's fairness doctrine, broadcasters must present contrasting points of view on controversial issues of public importance. See generally, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Fairness Report*, 48 F.C.C. 2d 1 (1974), aff'd, *NCCB* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977). cert. denied, May 30, 1978 (No. 77-1331). Broadcasters have broad discretion to determine the content of their programming and how best to satisfy their obligations under the fairness doctrine. *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111, 125-126 (1973). Generally, a broadcaster will be able to satisfy its fairness doctrine obligations within its sponsored programming.

[Footnote continued on page 6]

denied it equal protection of the laws in violation of the Fifth Amendment is baseless. Petitioner does not present an arguable claim to which an equal protection analysis might be applied.[6] Petitioner's claim

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[5] [Continued]
However, the "Cullman Rule" holds that in certain circumstances, particularly when no paying spokesman is available, broadcasters may have to make time available, without charge, for presentation of the opposing viewpoint. See *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1973).

[6] This Court has delineated standards for testing claims of denial of equal protection. The initial inquiry is whether the government action complained of

> operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. * * * If not, the * * * scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1, 17 (1973). Presumably the classification of which petitioner complains resulted from broadcast stations' giving free time to its opponents after having charged it for broadcast time, although petitioner has made no representation that the stations refused to give it free time. The action of the stations is in itself private action, rather than governmental action. In any event, to the extent that governmental action is implicated, this case clearly does not involve a suspect classification. Compare, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Moreover, as we demonstrate below, the Commission's decision in no way impinges upon petitioner's exercise of its First Amendment rights. The question, therefore, is whether the Commission's interpretation of the Communica-

rests on the inaccurate premise that the radio stations provided petitioner's opponents a "quota" of free time because the stations were compelled (or felt compelled) by the Commission to do so (Pet. 17-20). The Commission made it quite clear that the licensees were not required to give petitioner's opponents any quota of reply time—in fact were not required to give petitioner's opponents any time at all. See Pet. App. B6. This was consistent with long-standing Commission policy of affording licensees very broad discretion in deciding how to fulfill their responsibilities under the fairness doctrine.[7] Petitioner's assertion that the radio stations "felt that the Fairness

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tions Act and the fairness doctrine in these circumstances furthers a legitimate purpose and does not constitute invidious discrimination prohibited by the equal protection guarantees. This Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 121-132, demonstrates that it was reasonable and appropriate for Congress and the Commission to conclude that the public interest in being fully and fairly informed and in minimizing government control over the content of broadcast discussion of public issues would best be served by reliance on the editorial discretion of the licensee. The Commission's ruling in the instant case reiterated that principle, and petitioner failed to demonstrate to the Commission that these stations' provision of free reply time constituted an abuse of that discretion.

[7] See, *e.g.*, *Applicability of the Fairness Doctrine*, 40 F.C.C. 598, 599 (1964); *Fairness Report*, 48 F.C.C. 2d 1, 33 (1974), aff'd, *NCCB* v. *FCC*, *supra*; *Green* v. *FCC*, 447 F.2d 323, 328-329 (D.C. Cir. 1971); *Democratic National Committee* v. *FCC*, 460 F.2d 891, 898-900, 904 (D.C. Cir. 1972).

Doctrine compelled" them to give a "quota" of free time to petitioner's opponents (Pet. 17) is unsupported by any evidence in the record; on the contrary, the only licensee which responded to petitioner's complaint denied that it had felt compelled to give free time to petitioner's opponents.[8] See J.A. 22.

2. Petitioner's First Amendment argument (Pet. 26-31)—that the Commission interfered with the free speech of petitioner and the public—is similarly without merit. To the extent that petitioner contends that its free speech rights were chilled by the Commission's action, its position is contrary to *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 121-132, in which this Court held that neither the First Amendment nor

[8] A necessary component of petitioner's argument is that the action of the stations here constituted state action. See *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 461 (1952). Broadcasters' editorial judgments do not, however, constitute state action for purposes of the First Amendment. See, *e.g.*, *Kuczo* v. *Western Connecticut Broadcasting Co.*, 566 F.2d 384 (2d Cir. 1977); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945); *Moro* v. *Telemundo, Inc.*, 387 F. Supp. 920 (D.P.R. 1974); *Smothers* v. *Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972); *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971). See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra.* In any event, the court below found it unnecessary to reach that question, since, as we have shown, petitioner has made no colorable claim of a constitutional violation even if state action is involved.

the public interest standard of the Communications Act requires broadcast stations to make time available to any individual wishing to discuss his views on public issues. Indeed, a basic goal of the fairness doctrine since its inception has been to preserve "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee *or any individual member of the public* to broadcast his own particular views on any matter * * *." *Editorializing Report*, 13 F.C.C. 1246, 1249 (1949) (emphasis added). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Moreover, even if it is assumed that petitioner had a First Amendment right to present its views on broadcast stations, neither the stations nor the Commission in any way restricted petitioner's ability to do so. On the contrary, the stations in this instance sold petitioner as much time as it desired.[9] Thus, the court of appeals correctly held that any violation of petitioner's rights in this case could only be based on "a novel interpretation of the first amendment [that found] within its strictures a right not to be controverted in public political debate" (Pet. App. C7).

Petitioner's assertion that the public's First Amendment right to "receive access to social and political ideas" (Pet. 26) was "chilled" is frivolous. The

[9] Compare *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra* (no violation of the First Amendment where broadcast stations refuse to sell any time for editorial advertising).

broadcasters' actions here enhanced the public's "access" to debate on the merits of the referendum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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